Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 16, 1991.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 91–1)

This ruling holds that hang tags affixed to imported garments which bear a United States address and telephone number as part of a marketing program are not required to indicate the garments country of origin as otherwise required by 19 CFR 134.46.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 7, 1991.

File: HQ 733963
MAR–2–05 CO:R:C:V 733963 KG
Category: Marking

DUNCAN A. NIXON, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
1707 L Street, N.W.
Washington, D.C. 20036

Re: Country of origin marking of imported garments; 19 CFR 134.46; hang tag; U.S. address and telephone number

DEAR MR. NIXON:

This is in response to your letter of November 29, 1990, requesting a prospective country of origin ruling on behalf of Anne Klein II regarding imported garments which have a hang tag bearing a U.S. address and telephone number attached to them. Your client received a marking no-

tice from Customs at JFK Airport stating that the hang tag must either be marked with the country of origin of the garments or removed. Your client has complied with the marking notice.

Facts:

Your client imports garments which have a hang tag affixed to them. The hang tag describes a marketing program undertaken by your client which provides an 800 number for customer assistance and registration for other services provided by the program such as fashion consultation. The hang tag offers the customer the option of registering by mail and asks that the customer answer two basic questions regarding their past purchases. As part of the customer assistance services and the mail registration, the hang tag contains a telephone number and a U.S. address to mail in the registration. You state that all the imported garments themselves will be properly marked with their country of origin by means of a sewn in label.

Issue:

Whether the hang tags described above must be marked to indicate the country of origin of the garments to which they are affixed to satisfy the country of origin marking requirements.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in *Koru North America v. United States*, 701 F. Supp. 229, 12 CIT ___ (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States v. Friedlaender & Co.*, 27 CCPA 297 at 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.46, Customs Regulations (19 CFR 134.46), requires that when the name of any city or locality in the U.S., other than the name of the country or locality in which the article was manufactured or produced, appears on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters,

or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. The purpose of this requirement is to prevent the possibility of misleading or deceiving the ultimate purchaser of the actual origin of the imported goods.

In HQ 732329 (July 12,1989), Customs held that a warranty tag on a garment which contained a U.S. address did not trigger the requirements of 19 CFR 134.46. The article in question was a waterproof garment insert which was subject to bona fide warranty protection. Further, it was clear from the design of the hangtag that the U.S. address had been placed there to enable a wearer to contact the company if they had complaints or questions about the product. This case is very similar; the U.S. address and phone number do not connote origin and are placed on the hang tag as part of a widely publicized customer assistance marketing campaign. There is no possibility that this U.S. address and telephone number would confuse or mislead an ultimate purchaser as to the country of origin of the garments. Therefore, the requirements of 19 CFR 134.46 are not triggered by the use of the hang tag described above attached to imported garments.

Holding:

The hang tag described above does not trigger the requirements of 19 CFR 134.46. The hang tag which is affixed to imported garments is not required to be marked to indicate the country of origin of the garment.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs, and Admissibility Branch.

(C.S.D. 91–2)

This ruling holds that entries liquidated do not preclude the assessment of liquidated damages. A surety's liability ceased with the payment of duties and liquidated damages (19 U.S.C. 1484(a), 19 CFR 141.68(c), 19 CFR 141.61(d), and 19 CFR 142.1–142.16).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 30, 1991.

File: HQ 222836
LIQ–11–CO:R:C:E 222836 CB
Category: Entry/Protest

REGIONAL COMMISSIONER
U.S. CUSTOMS SERVICE
SOUTHWEST REGION
Suite 500
5850 San Felipe Street
Houston, TX 77057–3012

Re: Application for further review of Protest No. 2304–9–000083 under 19 U.S.C. § 1504(a)

DEAR SIR:

The above-referenced protest was forwarded to this office for further review. We have considered the points raised and our decision follows.

Facts:

This protest involves a surety's request for relief from payment of supplemental duties assessed. Protestant is the surety for the principal on two bonds covering said releases. Each bond has a liability limit of $50,000.00 and was cancelled by protestant in March of 1986. The 13 entries being protested are part of 68 releases during the period of September 1983 through August 1984. Entry numbers and dates were assigned at the time of release.

The importer of record failed to present sixty-eight (68) entry summaries against sixty-eight (68) releases. Liquidated damages were assessed for value plus estimated duty based on information derived from the CF 3461. The protestant/surety sent two checks for a total of $36,242.48 which was the amount of duty shown on the CF 5955–A. On July 22, 1986, the entry numbers originally assigned to the releases were cancelled. A letter was issued to the importer of record demanding presentation of the entry summaries for the purpose of applying estimated duties to these releases.

Entry summaries were presented on August 29,1986, for sixty-seven (67) entries. One entry was held pending correct classification because the shipment was seized. Payment was not included with the entry summaries. The entry summaries were back dated and new entry numbers were assigned. The thirteen (13) entries being protested were liquidated for increased duties based on the information contained in the entry

summaries. Demand was made on the protestant/surety for the additional duties on June 16, 1989. Protestant/surety claims that the entries liquidated by operation of law pursuant to 19 U.S.C. § 1504(a).

Issues:

1) Whether the subject merchandise was released under an immediate delivery permit or an entry release?

2) Whether a surety remains liable for additional duties assessed after liquidation if the bond used to obtain release expires before an entry summary is filed?

Law and Analysis:

It is the protestant/surety's position that the merchandise was entered during the period of September 1983 through August 1984. Therefore, because Customs failed to liquidate the entries within one year of entry, all of said entries were liquidated by operation of law. We agree with protestant/surety's claim that the merchandise was entered at the time of release and that Customs is precluded from assessing additional duties.

Liquidation of an entry of merchandise constitutes the final computation by Customs of all duties accruing on that entry. *See generally, Ambassador Division of Florsheim Shoes v. United States*, 748 F.2d 1562 (Fed. Cir. 1984). Section 504, Tariff Act of 1930, as amended (19 U.S.C. § 1504 (1988)), provides that if Customs fails to liquidate an entry within one year from the date of entry or final withdrawal from warehouse, that entry is deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer, his consignee, or agent. Customs is permitted to extend the one year period, under 19 U.S.C. § 1504(b), if additional information is needed to classify the goods, liquidation is suspended by statute or court order, or if the importer, consignee, or his agent requests an extension. Customs must provide the importer with notice of the extension.

Section 448, of the Tariff Act of 1930, as amended (19 U.S.C. § 1448(b)), and the Customs Regulations issued thereunder, provides that the Secretary of the Treasury is authorized to provide for the issuance of special permits for special delivery (immediate delivery), prior to formal entry therefore. Customs administration of the special delivery (immediate delivery) statute is governed by 19 CFR 141.68 (c) which provides as follows:

> When merchandise is released under the immediate delivery procedure. The time of entry of merchandise released under the immediate delivery procedure shall be the time the entry summary is filed in proper form, with estimated duties attached.

However, in the instant case, the record indicates that entry releases were made rather than immediate delivery releases. The immediate delivery application (CF 3461) for eleven of the releases show it as a Code "01" entry. The Entry Record (CF 5101) show it as a free or dutiable consumption entry. Code "01" is such an entry under Customs Directive

3550–03 of September 28, 1984. Paragraph 2 of the Instructions for Preparation of CF 7501.

Under 19 CFR 141.61(d) (1979 ed.) a CF 5101 is completed only when an entry is made. See also the corresponding regulations for immediate delivery 19 CFR 142.1–142.16. Likewise, the Customs Manual, Section 8.8, (In effect unless superseded per Manual Supplement 2114–02 of September 10, 1979.) instructs Customs Officers as to the purpose of the CF 5101. Compare with Section 8.59 of that same Manual. Additionally, all of the entries are recorded as entry releases for which no entry summaries have been filed on a Customs Report dated December 7, 1985. Therefore, protestant/surety's contention that these entries liquidated by operation of law is correct. The subject merchandise was released under an entry release during the period of September 1983 through August 1984. Customs failed to extend liquidation of the entries as provided for in 19 U.S.C. § 1504. Consequently, Customs may not assess supplemental duties based on the entry summaries filed in August of 1986.

Protestant/surety's alternate claim is that if entry was not effected until 1986, they were not covered by the bonds. Furthermore, that if Customs maintains that entry was in 1986, then the bonds were not effective for these entries at any time and Customs should refund the estimated duties and liquidated damages previously paid by protestant/surety. We disagree with this contention. The subject releases were covered by an Immediate Delivery and Consumption Entry Bond (CF 7553) as indicated by the record. The bond protects the government from losses as a result of non-compliance with Customs regulations. The regulations provide that the entry summary shall be filed within 10 working days after the time of entry. 19 CFR 142.12(b). Customs interpretation of a surety contract was set forth in C.S.D. 87–20. As stated, "the contract of a surety is interpreted according to the standards that govern the interpretation of contracts in general. * * * Contracts are construed most strictly against a compensated surety and in favor of the indemnity."

One of the conditions included in said bond is the principal's obligation to make or complete entry. *See* 19 CFR 113.62. If the principal defaults in this condition, the obliger agrees to pay liquidated damages. A surety's obligations under the contract is construed by reading together all of the instruments, statutes and regulations underlying the transaction. *St. Paul Fire and Marine Insurance Co. v. Commodity Credit Corporation*, 474 F.2d 192 (5th Cir. 1973). In the instant case, 19 CFR 142.12(b) provides that the applicable entry documentation must be filed within 10 working days after the time of entry. As stated by the Court of International Trade in *United States v. Atkinson*, 6 CIT 257, 575 F. Supp. 791 (1983), a surety is financially obligated under the immediate delivery consumption entry bond to pay liquidated damages when the principal fails to comply with Customs requirements. In the

instant case, protestant's liability accrued on the eleventh day when the bond was breached because of failure to file the entry summaries timely.

The regulations also provide that the district director shall make an immediate demand for liquidated damages in the case of failure to file documentation timely. 19 CFR 142.15. Regarding the subject protest, liquidated damages were issued against the entries on December 23, 1985. Protestant/surety contends that it is entitled to a refund of the estimated duties and liquidated damages paid. As stated by the Court of International Trade, in *Halperin Shipping Co., Inc. v. United States*, 24 Cust. B. & Dec. No. 29, p. 81, Slip Op. No. 90–63 (CIT July 2, 1990), "[u]pon receipt of the notice demanding payment of estimated duties and liquidated damages, any right * * * to contest the amount of duties due or any other matters relating to the liquidation of the merchandise at issue had expired when the items were liquidated, or as appears the case here, deemed liquidated by statute, and the time to protest had lapsed. * * * [Plaintiff] is thus precluded from contesting the amount of estimated duties it paid." In other words, protestant/surety should have filed a 19 U.S.C. § 1514 protest within 90 days after liquidated damages were assessed.

Therefore, Customs demand on the surety/protestant for payment of estimated duties and liquidated damages was proper. However, protestant/surety's obligation under the terms of the bond ceased with the payment of said estimated duties and liquidated damages. The subject bonds had been cancelled on March 6, 1986. The subject entries were mistakenly liquidated by Customs in November of 1986. Consequently, protestant/surety is not liable for additional duties assessed upon liquidation.

Holding:

The subject merchandise was released under an entry release. Customs failed to liquidate the subject entries within one year from the date of entry. Therefore, the entries liquidated by operation of law. However, Customs demand on the surety/protestant for payment of estimated duties and liquidated damages was proper. You should deny protestant's claim for reimbursement of estimated duties and liquidated damages. At the same time, protestant/surety's obligation under the bond ceased upon the payment of estimated duties and liquidated damages. Therefore, you should approve protestant's request for relief from payment of supplemental duties assessed.

MARVIN M. AMERNICK,
(For John Durant, Director,
Commercial Rulings Division.)

(C.S.D. 91–3)

This ruling outlines the specifications that the United States Customs Service would find acceptable in establishing fungibility of automotive gasolines for purposes of substitution same condition drawback (19 U.S.C. 1313 (j)(2)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 5, 1991.

File: HQ 220153
DRA–4–CO:R:C:E: 220153
Category: Drawback

Re: Fungibility of Automotive Gasolines for Purposes of Substitution Same Condition Drawback (19 U.S.C. 1313(j)(2))

Facts:

Submitted specifications were insufficient for a determination whether imported designated and substituted automotive gasolines were fungible. However, for the benefit of the industry, this ruling outlines the specifications that Customs would accept to show fungibility for this merchandise.

Issue:

The issue is whether the grades for automotive gasolines of the American Society for Testing Materials (ASTM) are useful guidelines to determine the fungibility of those fuels for purposes of the substitution same condition drawback (19 U.S.C. 1313(j)(2)). Our response is in the affirmative.

Law and Analysis:

One of the requirements under the substitution same condition drawback law (19 U.S.C. 1313(j)(2)) is that the merchandise substituted for exportation must be fungible with the duty-paid merchandise and in the same condition as was the imported merchandise at the time of its exportation. Section 191.2(l) of the Customs Regulations defines the term "fungible merchandise" as "merchandise which for commercial purposes is identical and interchangeable in all situations." We are satisfied that the ASTM standards for automotive gasolines are useful guidelines to determine if two shipments meet the requirements of the law and regulations for fungibility.

Holding:

Two shipments of automotive gasolines that meet the Standard Specifications For Automotive Gasoline, Designation ASTM–D–439 of the ASTM, on a volatility for volatility class basis, that contain the same octane ratings, that are substituted on the basis of leaded-for-leaded or unleaded-for-unleaded, and contain the same additives (if any) are

fungible for purposes of the substitution same condition drawback law (19 U.S.C. 1313(j) (2)) .

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–4)

This ruling holds that steel bands used to bundle imported tin-lead ingots would constitute containers for purposes of 19 CFR 134.33. The steel bands are required to be marked to indicate the country of origin of the tin-lead ingots.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 12, 1991.

File: HQ 73318
MAR 2–05 CO:R:V:C 733187 RSD
Category: Marking

AREA DIRECTOR OF CUSTOMS
Newark International Airport
Newark, New Jersey 07114

Re: Country of origin marking of imported steel bands used to bundle imported tin-lead ingots; J-list; 19 CFR 134.33

DEAR SIR:

This is in response to your request for internal advice concerning a letter dated March 9, 1990, submitted by E. Thomas Honey of Barnes, Richardson & Colburn, on behalf of ABB Trading (U.S), Inc., concerning imported steel bands used to bundle imported tin-lead ingots.

Facts:

This matter arises in the context of a penalty case involving the failure to mark the country of origin of tin-lead ingots on the steel bands that were used to hold the ingots together. By letter dated March 9, 1990, the importer, through its attorney, wrote directly to Customs Headquarters requesting a ruling on whether the steel bands had to be marked with the country of origin of the ingots. A member of your staff has requested us to review the letter and treat it as an internal advice request in accordance with Part 177, Customs Regulations (19 CFR Part 177). It is our understanding that action on the penalty matter (case no. 90–4601–2023) has been suspended in our reply.

Issue:

Do imported steel bands used to bundle imported tin-ingots have to be marked with the country of origin of the ingots even though both the bands and the ingots are on the J-list?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchases in the U.S. the English name of the country of origin of the article, Congressional intent in enacting 19 U.S.C. 1304 was that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302.

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Certain classes of articles which are specified in section 134.33, Customs Regulation (19 CFR 134.33), known as the "J-list," are excepted from individual country of origin marking pursuant to 19 U.S.C. 1304(a)(3)(J). 19 CFR 134.33 further provides that if an article included on the "J-list" is imported in a container, the outermost container in which the article ordinarily reaches the ultimate purchaser is required to be marked to indicate the origin of its contents.

The importer presents two arguments why the steel bands should not be marked with the country of origin of the ingots. First, metal bands should not be treated as a container for purposes of 19 CFR 134.33. Second, steel bands, themselves are on the "J-list," and should be excepted from the country of origin marking requirements on this basis.

With respect to the first argument, Customs has issued a number of rulings determining that metal bands are considered containers for country of origin marking purposes. See C.S.D. 79–205, HQ 707810, October 23, 1978; HQ 731768, December 8, 1988; HQ 731335, July 28, 1988; and HQ 731555, July 18, 1988. Although these rulings specify that metal band are considered containers for purposes of qualifying for an exception from marking under 19 U.S.C. 1304(a)(3)(D), we see no reason why metal bands should not be considered containers for purposes of 19 CFR 134.33. First, we are unpersuaded by the importer's arguments that steel bands should be considered containers only when such a determination would ease the marking requirements but not when such determination would result in a more restrictive interpretation of the marking statute. If metal bands are treated as containers for purposes of qualifying for an exception from marking under 19 U.S.C. 1304(a)(3)(D), they also should be treated as containers for marking J-listed articles under 19 U.S.C. 1304(a)(3)(J) and 19 CFR 134.33. Second, we believe the requirement to mark the container of a "J-list" article with the country of origin of its contents is to ensure that the ultimate purchaser is advised of the country of origin of the article whenever pos-

sible. Requiring country of origin marking on the metal bands is consistent with this interpretation. Finally, the steel bands that were used to bundle the ingots in this case fit within a commonly understood idea of a container, as something that holds something. Accordingly, in C.S.D. 89–102, dated May 16, 1989, Customs determined that metal bands holding steel bars are considered containers under 19 CFR 134.33. We see no basis for concluding that steel bands used to hold ingots are not containers within the meaning of 19 CFR 134.33.

The Importer's second argument is that the steel bands are excepted from marking because such articles are included on the J-list. It is argued that the language of 19 U.S.C. 1304(b) regarding the marking of containers, dictates that containers are entitled to the same exceptions to marking as other articles. 19 U.S.C. 1304(b) specifies:

> Whenever an article is excepted under subdivision (3) of subsection (a) of this section from the requirements of marking, the immediate container, if any, of such article, or such other container or containers of such article as may be prescribed by the Secretary of the Treasury, shall be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of such article, *subject to all provisions of this section, including the same exceptions as are applicable to articles under subdivision (3) of subsection (a) of this section*. If articles are excepted from marking requirements under clause (F), (G), or (H) of subdivision (3) of subsection (a) of this section, their usual containers shall not be subject to the marking requirements of this section. Usual containers in use as such at the time of importation shall in no case be required to be marked to show the country of their own origin. (emphasis added)

This section generally requires that when an article is excepted from marking for any of the reasons listed in 19 U.S.C. 1304(a)(3), including, because the article is on the "J-list," its container should be marked to indicate the country of origin of the article. Since ingots are excepted from country of origin marking because they are on the "J-list" their containers ordinarily must be marked to indicate the country of origin of the ingots. Although the importer correctly states that steel bands are also included on the "J-list," we disagree with the conclusion that the steel bands are not required to be marked with the country of origin of the ingots. While the emphasized language provides that the same exceptions from marking that apply to articles under subsection (a)(3) apply to their containers which ordinarily are required to be marked under 19 U.S.C. 1304(b), we conclude that because of the peculiar nature of the 19 U.S.C. 1304(a)(3)(J) exception, this exception from marking applies only to imported articles and/or their containers which ordinarily have to be marked to indicate their own country of origin.

Pursuant to 19 U.S.C. 1304(a)(3)(J) excepted articles include those which are "of a class or kind with respect to which the Secretary of the Treasury has given notice by publication in the weekly Treasury Deci-

sions within two years after July 1, 1937, that articles of such class or kind were imported in substantial quantities during the five-year period immediately preceding January 1, 1937, and were not required during such period to be marked to *indicate their origin* * * * (emphasis added)."

19 CFR 134.33 specifies that articles of a class or kind listed below are excepted from the requirements of country of origin marking *in accordance with the provisions of 19 U.S.C. 1304(a)(3)(J).* (emphasis added) On the basis of the language set forth in 19 U.S.C. 1304(a)(3)(J), we conclude that inclusion on the J-list means only that an article does not have to be marked to indicate *its own country of origin*. Inclusion on the J-list does not except an article from being marked to indicate the country of origin of another article under the provisions of 19 U.S.C. 1304 and 19 CFR Part 134.

In this case, the marking notice was issued because the bands were not marked to indicate the country of origin of the ingots which they held. We conclude that the J-list exception applicable to steel bands does not apply in such circumstances. As a container for imported ingots, pursuant to 19 U.S.C. 1304(b) and 19 CFR 134.33, they were required to be marked with the country of origin of the ingots.

Holding:

Steel bands holding tin-lead ingots are considered to be containers for purposes of 19 CFR 134.33 and are therefore required to be marked to indicate the country of origin of the ingots. Although steel bands are found among the excepted items listed in 19 CFR 134.33 which would not be required to be marked to indicate their own country of origin, such exception does not apply when the steel bands are required to be marked to indicate the country of origin of their contents. The steel bands must be marked to indicate the country of origin of the tin-lead ingots. A copy of this ruling should be provided to the importer's attorney.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–5)

This ruling holds, in accordance with 19 CFR 134.35, that replacement automotive glass is not substantially transformed when installed into an automobile therefore, the automobile owner is the ultimate purchaser and the glass must be marked to indicate the proper country of origin.

This ruling is effective with regard to automotive glass entered or withdrawn from warehouse *on or after June 1, 1991.*

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 1, 1991.

File: HQ 734092
MAR–2–05 CO:R:C:V 734092 RSD
Category: Marking

JOHN POLITIS, ESQ.
POLITIS, POLLACK & DORAM
660 Wilshire Place, Suite 404
Los Angeles, California 90005

Re: Reconsideration of HRL 731506, Country of origin marking of imported automotive glass; 19 CFR 134.35

DEAR MR. POLITIS:

On February 15, 1991, Customs issued Headquarters Ruling 733604 which affirmed Headquarters Ruling Letter 731506 (May 1, 1990, requiring that automotive replacement glass be marked with its country of origin. After issuance of the February 15, 1991, decision, Customs was again asked to reconsider this determination and alternatively to delay the implementation date of the ruling in order to give the industry more time to comply. We have concluded that no substantive changes are warranted. However, the implementation date is changed from April 1, 1991 to June 1, 1991. The following is a reproduction of Customs HQ 733604, except that it contains the modification in the effective date from April 1, 1991 until June 1, 1991.

Facts:

On May 1, 1990, Customs advised the District Director of Customs in Los Angeles, California, that automotive glass imported by Mitsubishi from Japan for the replacement automotive market must be marked with its country of origin. In that ruling Customs determined that when imported, the glass was already cut to shape and dedicated to use as either a windshield, rear window, or side window and made to fit a particular automobile type and model. It was imported in a finished condition and merely had to be installed. For these reasons, we determined that the glass was not substantially transformed when it was installed into an auto and the ultimate purchaser is the auto owner and not the installer. Because the auto owner who purchases the glass is the last person in the U.S. to receive it in its imported form, we found that it must be

marked with its country of origin. Although the ruling indicated that the marking requirements were best met by marking worked into the glass at the time of manufacture, it was not mandated. The marking only had to be sufficiently permanent to insure that in any reasonably foreseeable circumstance it would remain on the glass until it reaches the ultimate purchaser.

Various arguments have been raised to support the contention that replacement glass should be excepted from country of origin marking. It is contended that the installation is complex and requires special expertise. In this regard, specific information was provided which indicates that it takes skill and special tools and equipment, that it may take a professional installer from one to 7½ hours to replace damaged glass, and that it is not done by "do-it-yourselfers." Because of this, it is maintained that the ultimate purchaser is the installer and not the auto owner. It is also pointed out that the auto owner will not see a marking on the glass until after it is installed. Therefore, it is argued that the purpose of the marking statute of advising the ultimate purchaser of the country of origin of the imported article before its purchase, will not be served. It is also contended that before HRL 731506 was issued, Customs had a long-standing established practice to allow the container in which replacement glass is packaged to be marked with the country of origin, rather than marking the glass itself.

Issue:

Does imported replacement automotive glass have to be marked with its country of origin?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.* 27 C.C.P.A. 297 at 302; C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as the country of manufacture, production or growth of any article of foreign origin entering the U.S.

Your submission, and others, agree that the purpose of the marking statute is to advise the ultimate purchaser of the country of origin of the

imported article *before* its purchase so that a person can make a conscious choice if country of origin is an important consideration. It is explained however, that as a practical matter, vehicle owners never see the replacement glass until after it is installed by professional glass installers. This is because replacement glass is not sold in retail outlets such as automotive part stores. Rather it is imported and sold through distributors to body shops and glass installers. The installation is extremely complicated and must be done with care and specialized equipment and tools. Accordingly, it is done by professional installers, not "do-it-yourselfers."

As noted in our ruling of May 1, 1990, no evidence had been submitted that the installation of automotive glass was particularly complex or required a great deal of skill. Based on the considerable evidence now submitted concerning the installation process, it is asserted that the installation makes the glass installer the ultimate purchaser of the glass. This assertion seeks to separate the question of who is the ultimate purchaser from whether the installation of the glass constitutes a substantial transformation. However, the concepts of ultimate purchaser and substantial transformation are intertwined, and a determination of whether there is a substantial transformation must be made to determine who is the ultimate purchaser.

The definition of ultimate purchaser is set forth in section 134.1(d), Customs Regulations (19 CFR 134.1(d)), as generally the last person in the U.S. who will receive the article in the form in which it was imported. The first example of an ultimate purchaser provided in 19 CFR 134.1(d) indicates that if an imported article is used in manufacture, the manufacturer may be the "ultimate purchaser" if he subjects the imported article to a process which results in a substantial transformation of the article, even though the process may not result in a new or different article. However, if the manufacturing process is merely a minor one which leaves the identity of the imported article intact, the consumer or user of the article who obtains the article after the processing, will be regarded as the "ultimate purchaser."

The case of *U.S. v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940), provides that an article used in manufacture which results in an article having a name, character or use differing from that of the constituent article will be considered substantially transformed. Section 134.35, Customs Regulations (19 CFR 134.35), indicates that under the principle of *U.S. v. Gibson-Thomsen Co., supra*, the manufacturer or processor in the U.S. who converts or combines the imported article into a different article will be considered the "ultimate purchaser" of the imported article within the contemplation of 19 U.S.C. 1304(a), and the article shall be excepted from marking. Only the outermost containers of the imported articles shall be marked.

Therefore, to determine who is the ultimate purchaser of the imported automobile glass, it is necessary to determine if the glass is substantially transformed in the U.S. In HRL 731506, we noted that the

glass is imported in a finished condition already cut to size and is merely installed into the auto. Furthermore, it is imported already cut to shape and dedicated to use as either a windshield, rear window, or side window and made to fit a particular automobile type and model. Evidence has now been presented in an effort to establish that installation of replacement glass is a complex undertaking. Although the complexity of the processing is a factor to consider in determining whether a substantial transformation has occurred, it is not determinative. To have a substantial transformation, the U.S. processor must subject the imported article to a process which results in an article with a name, character, or use differing from that of the imported article. In this case, because the imported replacement glass is already cut to the exact dimensions to fit a specific model of auto and the installer in no way changes the glass itself when he installs it into an auto, after installation, the glass still has the same name, character, and use. In other words, the identity of the glass is left intact after installation. Consequently, the installer does not substantially transform the glass and cannot be considered the ultimate purchaser of the glass within the meaning of 19 CFR 134.35. In support of the position that the glass installer is the ultimate purchaser, a ruling regarding imported unmarked transmission gears and other transmission and differential parts, was cited (HQ 732063, January 18, 1988). However, that ruling never addressed the question of who was the ultimate purchaser, and therefore it is not helpful in this case.

Based on the above considerations, we affirm our previous finding that the auto owner, who has replacement glass installed in his/her auto is the ultimate purchaser. As the ultimate purchaser of the glass, the auto owner is entitled to know the country of origin of the glass. Although it is possible that the auto owner may not have an opportunity to see the country of origin marking until after the glass is installed, 19 U.S.C. 1304 requires that all articles of foreign origin be marked with the country of origin unless otherwise excepted. Neither the statute nor the implementing regulations provide an exception from country of origin marking for the reason that the ultimate purchaser may not see the marking until after installation or purchase. Moreover, the ultimate purchaser still may want to be informed of the country of origin of the glass after installation, in the event he/she needs to make a future purchase of auto glass or if he/she wants to refer other individuals to a particular glass installer.

It is also claimed that Customs has a long-standing established practice to permit marking of the container in which replacement glass is packaged in lieu of the glass itself. However, no information has been presented to demonstrate this position. Moreover, HQ 731506 was the first time the question regarding the marking of replacement auto glass was addressed. We find marking only the glass packaging would not be sufficient to inform the ultimate purchaser of the country of origin because the ultimate purchaser will probably never see the marking on the packaging.

Several submissions noted that an auto owner purchases not only the glass, but also the installation of the glass. They sell their skills as installers and derive the majority of their profit from installation. Further, they will not sell uninstalled glass to an auto owner. It was also noted that in many instances the auto owner has no choice in purchasing the glass because insurance companies are paying for the glass and tell the auto owner where to take it for the replacement glass to be installed. Since all auto glass must meet federal safety and quality standards, it is contended that the insurance company selection is ordinarily based on price alone.

While all of this may be true, it does not affect the basic intent of the country of origin marking law. None of these factors is considered sufficient reason for not giving an auto owner the opportunity to ascertain the source of the glass to be installed in his/her auto.

In HQ 731506, we indicated that section 134.41(a), Customs Regulations (19 CFR 134.41(a)), states that as a general rule, marking requirements are best met by marking worked into the article at the time of manufacture. We stated that the marking requirements of 19 CFR 134.41 are best met by marking worked into the glass at the time of manufacture which would be visible to the auto owner purchasing the glass. However, we did not mandate that the country of origin marking *had* to be worked into the glass. The marking only had to be sufficiently permanent to insure that in any reasonably foreseeable circumstance, it would remain on the glass until it reaches the ultimate purchaser unless it is deliberately removed. While one submission urges that sandblasting the country of origin onto glass is the only way to insure that the marking is permanent and that it will be seen, others point out that they now use an adhesive label applied directly to the glass and that it has significant permanence to insure that it will remain on the glass throughout normal handling in distribution, storage, and installation unless it is deliberately removed. Customs believes the industry can best decide on the method of marking. However, we also affirm that the requirements would be best satisfied by marking into the glass at the time of manufacture, be it by sandblasting, etching, painting or any other method. But it is *not* required. Alternate methods of country of origin marking, such as placing adhesive stickers on the glass would comply with 19 U.S.C. 1304 and 19 CFR 134.41 as long as the importer satisfies the district director at the port of entry that the marking will remain on the glass throughout distribution until it reaches the ultimate purchaser. If the district director has grounds to believe that the marking is being removed before it reaches the ultimate purchaser, it might be necessary to require that the glass be permanently marked.

Another suggested alternative to marking was that the glass installer be required to display the country of origin on the invoice issued to the consumer. Customs does not have the authority to require this nor do we think it could serve as an alternative to marking. However, a glass installer that wanted to ensure that the ultimate purchaser was aware of

the country of origin could certainly do this in addition to marking the glass. Another positive step that an importer could take would be to issue instructions to installers not to remove the adhesive label until the ultimate purchaser has had an opportunity to see it. These and other methods could be used to satisfy the district director that the marking will not be removed until it reaches the ultimate purchaser.

Several associations noted that requiring country of origin to be worked into the glass at the time of manufacture would result in a major economic burden on glass manufacturers and, as a consequence, this would be passed on to the auto owner. The reason given is the need for changing hundreds of dies for production of replacement glass for older model vehicles. In addition, they contend that large existing stocks of unmarked glass are maintained and that the marking requirement is only for glass to be imported for sale in the U.S. Manufacturers sell the same glass in other countries that do not require marking. Although not specific, they seem to infer that this could cause problems.

To lessen any economic burden, Customs is not requiring that the marking be worked into the glass. In fact, no specific method of marking is being mandated. Any method of marking that will comply with the law and regulations will be acceptable to Customs as long as it remains on the glass until the ultimate purchaser has had an opportunity to see it. No dies need be changed and the cost of labeling existing stocks should be minimal. Customs will however, discuss any particular problem an importer may have on a case-by-case basis.

To allow affected persons an opportunity to use existing stocks and to make appropriate changes needed to comply with this ruling, we are delaying the effective date until June 1, 1991. During the interim period, Customs will allow imported automotive replacement glass to be marked with its country of origin either on the glass or its container.

Holding:

We affirm our findings in HQ 731506 that imported replacement automotive glass is not substantially transformed when it is installed into an auto and that the auto owner is the ultimate purchaser. Accordingly, the replacement glass must be marked with its country of origin. The country of origin marking requirement is best met by marking worked into the glass at the time of manufacture. However, the marking may be accomplished by alternative methods, such as stickers on the glass if the district director at the port of entry is satisfied that the marking will remain on the glass until it reaches the ultimate purchaser.

The ruling will be effective with regard to automotive glass entered or withdrawn from warehouse for consumption on or after June 1, 1991.

Customs emphasizes that this ruling applies only to replacement glass that is imported in a finished condition already cut to shape and size for a particular auto. The ruling does not apply to glass imported as original equipment to be installed in new vehicles by automobile manu-

facturers. Likewise, it does not apply to imported glass which must be further processed in the U.S. before it can be installed.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–6)

This ruling holds that payments made by a buyer to the seller are not dutiable under the royalty provision of the Trade Agreements Act but are dutiable as proceeds of subsequent resale (Section 402(b)(1)(D) and (E), Title IV, Trade Agreements Act of 1979, 93 Stat.145).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 4, 1991.

File: HQ 544436
VAL CO:R:C:V 544436 VLB
Category: Valuation

DISTRICT DIRECTOR
909 First Avenue
Room 2039
Seattle, Washington 98174

Re: Dutiability of Royalty Payments; IA 69–89

DEAR SIR:

This is in response to your memorandum (APP–6 SE:C:D VY), dated November 3, 1989, requesting internal advice on the dutiability of payments made by Hasbro Industries, Inc. (hereinafter referred to as "the importer") to Takara Co., Ltd. (hereinafter referred to as "the seller"). We regret the delay in responding.

Facts:

The importer, in a letter dated August 10, 1989, states that it buys and imports toys from the seller, who is the licensor. Upon the resale of the toys in the U.S. the importer must make a royalty payment to the seller. The importer has provided a copy of an Agreement that was executed between the importer, the seller, and Takara U.S. on November 1, 1983.

Under the Agreement, Takara U.S. agreed to release its rights to sell certain toys within a specified territory that included the U.S. Agreement, page 2, para. 1. The seller agreed to make certain products available for exclusive sale within the territory, and the importer agreed to buy the products that were manufactured by the seller. Agreement, page 3, para. 2. The individual sales agreement, the "Purchase Contract", made between the parties is subject to the terms and conditions of the royalty agreement. *Id.*

Further, the seller granted the buyer the exclusive right to sell the products within the territory, as well as the right to manufacture or sub-

contract the manufacturing of the products. Agreement, page 3, para. 3. In consideration for these rights, the importer agreed to pay Takara U.S. a royalty rate between 5% and 7% of the "Invoice Price" of the products, regardless of whether the importer purchased the products from the seller, or manufactured the products. The specific royalty rate varied by product depending upon the profit level of the importer. Agreement, page 7, para. 8.

The "invoice price" is defined as the importer's "Invoice Price minus Seven Percent (7%) to cover any and all deductions and allowances." All royalties that were due to Takara U.S. accrued upon the sale of the products regardless of the time of collection by the importer. The products were considered to be "sold" on "the date when it is billed or invoiced, shipped or paid for, whichever occurs first". Agreement, page 8, para. 8(1).

Finally, the importer must pay a minimum royalty of $1,000,000 annually to maintain the exclusiveness of its right to the listed products. *Id.* If the importer fails to pay the minimum royalty, Takara U.S. has the option of cancelling the Agreement or of converting the Agreement to a nonexclusive right to sell the products.

Subsequently, on July 31, 1984, the Agreement was amended "to more accurately reflect the relative contributions of Takara Co., Ltd. and Takara Toys Corporation [Takara U.S.] in the implementation of the Agreement and to reflect the fact that Takara Co., Ltd's involvement has been far more than originally anticipated while Takara Toys Corporation's [Takara U.S.] involvement has been far less than originally anticipated". Under the amendment, as of August 1, 1984, the royalties that the importer was to pay to Takara U.S., were to be split. Ninety percent of all royalty payments were to be paid by the importer directly to the seller. Ten percent of the royalty payments were to be paid to Takara U.S.

A Supplemental Agreement was executed between the parties on November 18, 1985. The Supplemental Agreement extended the sales territory and addressed television and motion picture rights involving the listed products and derivations of the products. In addition, the minimum royalty was raised to $1,500,000 annually. Supplemental Agreement, page 6, para. h.

Finally, a Continuation Agreement was executed on September 1, 1986, to extend the term of the Agreement and to remove Takara U.S. from the terms of the Agreement. All rights and duties of Takara U.S. under the Agreement were assumed by the seller.

Issue:

Whether the payments made by the buyer to the seller pursuant to the Agreement, the Supplemental Agreement, and the Continuation Agreement are included in the dutiable value of the merchandise.

Law and Analysis:

Transaction value, the preferred method of appraisement is defined in section 402(b), Tariff Act of 1930, as amended by the Trade Agree-

ments Act of 1979 (19 U.S.C. 1401a(b); TAA), as the "price actually paid or payable for the merchandise when sold for exportation to the United States."

In addition, sections 402(b)(1)(D) and (E) of the TAA provide for additions to the price actually paid or payable for:

> (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
>
> (E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

There does not appear to be any dispute that transaction value is the proper method of appraisement for the imported merchandise.

The importer contends that the royalty payments are not dutiable under section 402(b)(1)(D) of the TAA for several reasons. First, the importer argues that the royalty payments are based on future sales of the toys. That is, the payments are triggered upon the resale of the product rather than on the importation of the product.

In addition, the importer asserts that the royalty payment is paid for rights that are separate and apart from the right of ownership. Thus, the importer concludes that the royalty payments are not dutiable because the payments are not a condition of sale of the imported merchandise. The importer cites Headquarters Ruling Letters (HRL's), 542844, dated June 17, 1982, 544061, dated May 27, 1988, and 544129, dated August 31, 1988, to support its position.

In HRL 542844, the importer and the exporter entered into a license agreement that granted the importer the exclusive right to manufacture and distribute the exporter's products in North America. In consideration for the exclusive rights the importer agreed to pay a multi-year, multiple factor, royalty payment package to the exporter. The ultimate annual royalty payment to the exporter was determined by a percentage arrangement based on the importer's U.S. business. No royalty payments were due on products purchased from the exporter.

Customs held that the royalty payments were not dutiable under section 402(b)(1)(D). The rationale of the holding was that the importer would have been able to purchase the merchandise from the exporter regardless of whether the royalty fee was paid. Therefore, the payments were not a condition of the sale of the imported merchandise.

In addition, in HRL 542844, Customs stated that the royalty agreement specifically excluded the value of imported merchandise from the royalty computation formula. Thus, the fees were not so inextricably intertwined with the imported merchandise as to be considered part of the purchase price of the goods. Customs did not address the applicability of section 402(b)(1)(E).

HRL 544061, dated May 27, 1988, involved a situation wherein the importer entered into a license agreement with the licensor who owned certain proprietary rights in a product. The agreement granted the im-

porter an exclusive, unrestricted and unlimited right and license to manufacture, use and sell the product in the U.S. under the conditions set forth in the agreement. Two payments of $50,000 each were paid within 12 months from the date of execution of the agreement. The importer also paid the licensor a royalty based upon the net sales of the product only in situations where the importer purchased the product from a party other than the licensor.

Customs held that the royalty payments were not to be added to the price actually paid or payable for the merchandise under section 402(b)(1)(D) of the TAA. Customs found that the payments were not a condition of sale of the imported goods. The payments were not tied to the importation of the product but rather, were paid for the right to manufacture and use the product in the U.S. Moreover, if the imported product was used for testing or research, *i.e.*, uses which did not produce sales, no royalty was owed by the importer. Once again, Customs did not address the applicability of section 402(b)(1)(E).

In HRL 544129, dated August 31, 1988, the importer made royalty payments to a licensor that was related to the seller. The royalty payments were for the exclusive right to use and sell a drug in the U.S. The royalty was 5% of the importer's net sales. The importer also acquired the right to manufacture the drug in the U.S. if the manufacturer could not fulfill the requirements in the supply agreement. The importer also was granted the right to use the licensor's know-how. Finally, the amount owed to the licensor was reduced by payments made to an unrelated company in the U.S. that was originally involved in the early developments of the product.

In HRL 544129, Customs held that the royalty payments were not dutiable under section 402(b)(1)(D) of the TAA. The basis of the holding was that the payments were not a condition of the sale of the imported merchandise. The payment was for rights that were separate and apart from the right of ownership on payment of the purchase price. The royalty payments were triggered upon the resale of the product rather than the importation of the product. Customs cited HRL 544061, *supra*, as authority for this position. Customs did not address the applicability of section 402(b)(1)(E) in HRL 544129.

The facts in the present case are analogous to the facts in the cases cited by the importer. That is, the royalty payments are for the right to sell the imported products within a specified area, as well as to manufacture the products. Under the cited rulings these payments would not be considered to be a condition of sale of the imported goods. Therefore, the payments would not be dutiable royalties under section 402(b)(1)(D) of the TAA.

However, an examination of only section 402(b)(1)(D) does not provide a complete analysis of the issue presented. As previously discussed, section 402(b)(1)(E) of the TAA provides for proceeds of any subsequent resale of the imported merchandise that accrue to the seller to be added to the price actually paid or payable for the imported merchandise. In

the legislative history of the TAA Congress clearly stated that section 402(b)(1)(E) of the TAA must be examined in cases such as this one.

Specifically, in the Report of the Committee on Ways and Means, House of Representatives (H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979), at p. 80) concerning the adoption of the TAA, the Committee pointed out that "certain elements called "royalties" may fall within the scope of the language under *either* new section 402(b)(1)(D) or 402(b)(1)(E) *or both*" (emphasis added).

In the present case, there is no dispute that the royalty payments become due upon the importer's resale of the imported merchandise. These proceeds of the subsequent resale clearly inure to the benefit of the seller. Therefore, we hold that the "royalty" payments that the importer pays to the seller pursuant to the Agreement, the Supplemental Agreement, and the Continuation Agreement are to be added to the price actually paid or payable for the imported merchandise under section 402(b)(1)(E) as proceeds of subsequent resale.

As previously discussed, the importer must pay a minimum royalty of $1,500,000 annually. If the proceeds of the subsequent resale are not sufficient to meet this requirement, the importer will be required to pay the remaining amount to meet the minimum royalty. Any amount that the importer must pay beyond the proceeds of the subsequent resales will not be dutiable. This is due to the fact that there will not be any imported merchandise to which the payment would apply.

Finally, Customs recognizes that there are several Headquarters Ruling Letters that contain a general statement that when a royalty or license fee is determined not to be part of transaction value under section 402(b)(1)(D), no authority exists for including the fee in transaction value as proceeds of a subsequent resale under section 402(b)(1)(E).

Upon reviewing these statements in the context of the clear language of the statute, and the previously cited House Ways and Means Committee Report, we have determined that the position taken in the prior rulings is contrary to the Congressional intent of the TAA and renders meaningless the proceeds of subsequent resale provision in the TAA. As a result, the following HRL's are modified accordingly: 542900 (12–9–82), 542926 (1–21–83), 543529 (10–7–85), 543773 (8–23–86), 544102 (2–17–89).

Holding:

The payments made by the buyer to the seller pursuant to the Agreement, the Supplemental Agreement, and the Continuation Agreement are proceeds of a subsequent resale that accrue to the seller. Therefore, the payments are to be added to the price actually paid or payable under section 402(b)(1)(E).

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

General Notice

PERFORMANCE REVIEW BOARDS
APPOINTMENT OF MEMBERS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: General notice.

SUMMARY: This Notice announces the appointment of the members of the United States Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4313(c)(4). The purpose of the PRB's is to review senior executives' performance appraisals and make recommendations regarding performance appraisals and performance awards.

EFFECTIVE DATE: July 1, 1991.

FOR FURTHER INFORMATION CONTACT: Loretta J. Goerlinger, Director, Office of Human Resources, United States Customs Service, Post Office Box 636, Washington, D.C. 20044; telephone (202) 634-5270.

BACKGROUND

There are two (2) PRB's in the U.S. Customs Service.

Performance Review Board 1:

The purpose of this Board is to review the performance appraisals of senior executives rated by the Commissioner or Deputy Commissioner of Customs. The members are:

Daniel R. Black, Associate Director, Office of Compliance Operations, Bureau of Alcohol, Tobacco & Firearms;
Guy P. Caputo, Deputy Director, U.S. Secret Service;
John P. Simpson, Deputy Assistant Secretary (Regulatory, Tariff, and Trade Enforcement), Department of Treasury;
John C. Dooher, Director, Washington Center, Federal Law Enforcement Training Center; and
Ray M. Rice, Assistant Director, Office of General Training, Federal Law Enforcement Training Center.

Performance Review Board 2:

The purpose of this Board is to review the performance appraisals of all senior executives *except* those rated by the Commissioner or Deputy

Commissioner of Customs. All are Assistant Commissioners or Regional Commissioners of U.S. Customs Service. The members are:

Assistant Commissioners:

Samuel H. Banks, Office of Commercial Operations;
John E. Hensley, Office of Enforcement;
Charles W. Winwood, Office of Inspection and Control;
James W. Shaver, Office of International Affairs;
Charles E. Parkinson, Office of Congressional and Public Affairs;
George D. Heavey, Office of Internal Affairs;
Edward F. Kwas, Office of Management; and
William F. Riley, Office of Information Management.

Regional Commissioners:

Philip W. Spayd, Northeast Region;
Anthony N. Liberta, New York Region;
Richard G. McMullen, North Central Region;
George C. Corcoran, Jr., Southeast Region;
J. Robert Grimes, South Central Region;
James C. Piatt, Southwest Region; and
Quintin L. Villanueva, Pacific Region.

Dated: April 17, 1991.

CAROL HALLETT,
Commissioner of Customs.

[Published in the Federal Register, April 24, 1991 (56 FR 18874)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 91–24)

FORMER EMPLOYEES OF SOUTHERN TRIANGLE OIL CO., PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89–03–00158

MEMORANDUM OPINION

(Decided April 5, 1991)

Charles Pierson, pro se on behalf of plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U. S. Department of Justice (*Vanessa P. Sciarra*) for the defendant.

MUSGRAVE, *Judge*: In a memorandum order of February 11, 1991 this Court remanded this action to the Department of Labor ("the Department") pursuant to the directions of the Court of Appeals for the Federal Circuit in *Former Employees of Southern Triangle Oil Co. v. United States*, No. 90–1351 (January 22, 1991). Almost a year before, on February 14, 1990, this Court had remanded the case to the Department because of the Court's finding that the Department had erroneously promulgated the worker adjustment assistance program at issue in this action, covering certain former employees of the Southern Triangle Oil Company, so as to exclude from participation in that program Mr. Charles Pierson, also a former employee of that company and the petitioner herein. The Department was ordered to revise its determination in accordance with the Court's opinion to make clear to the Illinois state administering agency that a 1988 statute requiring retroactive provision of worker adjustment assistance for qualifying workers in certain industries applied to plaintiffs in this action, including Mr. Pierson. *Former Employees of Southern Triangle Oil Co. v. United States*, 14 CIT ____, 731 F. Supp. 517. The Department complied under protest and thereafter filed an appeal with the Court of Appeals for the Federal Circuit.

In its opinion referred to above, the Federal Circuit determined that a necessary finding had not been made on the question whether plaintiffs would have been certified but for the enactment of the 1988 statute. Accordingly, that court ordered that this matter be remanded to the Department once again with instructions that the Department make "an explicit determination" on that question. Slip Op. at 3. The case was so

remanded and the Department filed the results of its remand determination on March 6. On remand the Department made the following determination:

> All workers of Southern Triangle Oil Company, Mt. Carmel, Illinois and operating at various other locations in the states listed below who became totally or partially separated from employment on or after October 1, 1985 and before November 15, 1987 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.
>
> TA–W–22,071A ILLINOIS TA–22, 071C OHIO
> TA–W–22,071B INDIANA TA–W–22,071D WEST VIRGINIA

Revised determination at p. 3.

> The "explicit determination" ordered by the Federal Circuit was, whether workers separated from [employment with] Southern Triangle between October 1, 1985 and November 15, 1987 would have been certified as qualified for assistance under the Department's interpretation and application of the law, including its so called "25% rule," prior to the amendments made by the 1988 Act.

Slip Op. at 3. Such a determination is not explicitly stated in the excerpt reproduced earlier or any other part of the Department's revised determination. One solution to the Department's failure to make the explicit determination would be to remand this matter to the Department again, the third time, for such a determination. Given the extreme and unfortunate delay that the plaintiffs have already endured as a result of the Department's conduct of this case,[1] however, the Court should not return this matter to the administrative quagmire once again if that measure can be avoided; and the Court believes it can.

From the excerpt quoted above and other statements in the Department's remand determination, it can be inferred that the Department determined that the persons separated from employment with Southern Triangle at the locations and during the time periods stated would not "have been certified as qualified for assistance under the Department's interpretation and application of the law" prior to the 1988 amendments. It is a condition of the 1988 amendments that to qualify for assistance under the amendments' retroactivity provisions, a person must show that he would have been deemed ineligible for such assistance but for the amendments. Because the Department simply states that the listed groups of employees – which include Mr. Pierson and the other former employees involved in the present action – are eligible for adjustment assistance, that statement implies a Department finding that the "but-for" test (or more precisely in this case, the "not-but-for" test) described above, a necessary element of that eligibility, was met here. Also supporting this implication are the Department's statements that the workers here involved

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[1] See 14 CIT at ___, 731 F. Supp. at 523.

> have a timely petition which falls within the purview of the retroactive provisions of the Trade Act of 1974, as amended

and

> that the workers met the Group Eligibility Requirements of the Trade Act contained in Section 222 and that this revised certification supersedes the one issued by the Department on April 13, 1990 * * *.

Revised determination at p. 2.

Whether because of this necessary implication of the Department's determination or because any further proceedings at the agency level would, given its re-certification, be moot, it is neither necessary nor desirable to again return this matter to the Department. The Department has explicitly recognized that Mr. Pierson and the other former Southern Triangle employees identified in the re-certification are eligible to participate in the worker adjustment assistance program for former employees of that company. The Court deems this an explicit determination by the Department, as ordered by the Court of Appeals, that workers separated from employment with Southern Triangle between October 1, 1985 and November 15, 1987 would not have been certified as qualified for assistance under the Department's interpretation and application of the law, including its so-called "25% rule", prior to the amendments made by the 1988 Act. For better or worse, whether or not that program will in fact be of any assistance to those persons at this late date, the Court hereby accepts the Department's re-certification of March 6, 1991 and orders that it be published in the Federal Register immediately.

(Slip Op. 91–25)

SKF USA, INC.; AB SKF; SKF GMBH AND SKF GLEITLAGER GMBH; SKF FRANCE AND SARMA; RIV-SKF INDUSTRIES, S.P.A.; SKF SVERIGE, AB; AND SKF (U.K.) LIMITED, PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE AND ROBERT A. MOSBACHER, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89–06–00330

Plaintiffs challenge the determination by the Department of Commerce that the petition filed by defendant-intervenor was filed "on behalf of" the domestic cylindrical roller bearings and spherical plain bearings industries. Further, plaintiffs assert that the wheel hub units and aircraft bearings they manufacture were improperly included within the scope of these investigations.

Plaintiffs also contest the ITA's decision to use pricing data from a third country instead of from the home markets.

Held: The petition was filed on behalf of the relevant domestic industries and Commerce correctly concluded that wheel hub units and aircraft bearings were within the scope of these investigations.

The decision to use third country data instead of home market data to determine foreign market value was not in accordance with law and is remanded for further proceedings consistent with this opinion .

[ITA determination as to Counts 1, 4, 5, 6 and 8 of plaintiffs' Complaint is affirmed. ITA determination as to Counts 2 and 9 is remanded.]

(Dated April 8, 1991)

Howrey & Simon (*Herbert C. Shelley* and *Lauren D. Frank*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of counsel: *John D. McInerney*, Senior Counsel, *Douglas S. Cohen, Craig R. Giesse, Diane McDevitt, Stephanie J. Mitchell* and *Maria Solomon*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendants.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., David Scott Nance* and *Geert De Prest*) for defendant-intervenor.

OPINION

TSOUCALAS, *Judge*: Plaintiffs, SKF USA, Inc., AB SKF, SKF GmbH and SKF Gleitlager GmbH, SKF France and Sarma, RIV-SKF Industries, S.p.A., SKF Sverige AB and SKF (U.K.) Limited, (collectively "SKF") have filed this motion pursuant to Rule 56.1 of the rules of this Court for partial judgment on the agency record, to contest certain aspects of the final determinations of the Department of Commerce, International Trade Administration ("Commerce" or "ITA") in *Anti-friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany* ("Final Determinations"), 54 Fed. Reg. 18,992, *et seq.* (1989).

In particular, plaintiffs challenge the determination that petitioner, The Torrington Company ("Torrington"), had standing to bring an antidumping duty case "on behalf of" the domestic industries which manufacture cylindrical roller bearings and spherical plain bearings. Plaintiffs also assert that the wheel hub units and aircraft components they manufacture were improperly included in the scope of the investigation and should not be subject to antidumping duties. Plaintiffs also contest the ITA's decision to calculate foreign market value in Sweden and Italy using third country sales data and, ultimately, best information available.

The Court's jurisdiction is based on 28 U.S.C. § 1581(c) (1988).

BACKGROUND

The facts of this case were set out in detail in *NTN Bearing Corp. of America v. United States*, 15 CIT ____, Slip Op. 91–13 (Feb. 28, 1991). Briefly, the ITA, in its final determinations, found that petitioner had standing to bring an antidumping petition regarding each class or kind of bearing involved in this case, to wit, ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings and spherical plain bearings. *Final Determinations*, 54 Fed. Reg. at 19,006. SKF contests the initiation of the investigation into cylindrical roller bearings and spherical plain bearings. The ITA also determined that wheel hub units and aircraft bearings manufactured by SKF were within the

scope of the investigations. Further, the ITA decided not to use home market sales in its calculation of foreign market value, and instead used third country sales and ultimately, best information available.

DISCUSSION

A determination by the Department of Commerce will be affirmed unless that determination is not supported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT ____, ____, 685 F. Supp. 1252, 1255 (1988) (citations omitted). Under this standard, Commerce is granted considerable deference "in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law." *Chemical Products Corp. v. United States*, 10 CIT 626, 628, 645 F. Supp. 289, 291 (1986) (citations omitted).

I. *Standing*:

The statutory requirements for initiation by petition of an antidumping proceeding are that an interested party file a "petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations." 19 U.S.C. § 1673a(b)(1) (1988). SKF avers that Torrington's petition was not filed "on behalf of" the domestic cylindrical roller bearings and spherical plain bearings industries, and should have been dismissed. *Memorandum in Support of Plaintiffs' Motion For Partial Judgment Upon an Agency Record* ("Plaintiffs' Memorandum") at 14.

The Tariff Act of 1930 defines industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes *a major proportion* of the total domestic production of that product." 19 U.S.C. § 1677(4)(A) (1988) (emphasis added). Plaintiffs assert that this definition, combined with the "on behalf of" language of 19 U.S.C. 5 1673a, requires petitioner to prove that its petition has the express endorsement of a majority of the domestic industry, and that in this case, the petitioner did not so prove.

Upon the filing of an antidumping petition, Commerce presumes that the petition is filed on behalf of the relevant domestic industry. The Court in *NTN Bearing* found that this presumption is reasonable and is consistent with the intent of the statute. 15 CIT at ____, Slip Op. at 9; *see also Comeau Seafoods, Ltd. v. United States*, 13 CIT ____, ____, 724 F. Supp. 1407, 1411 (1989); *Florex v. United States*, 13 CIT ____, ____ 705 F. Supp. 582, 587–88 (1989). When opponents of the petition surface, however, the presumption is cast aside and the ITA investigates the

depth of the opposition to the petition.[1] If supporters of the petition constitute a major proportion of the industry, the investigation must proceed. If not, then the ITA has the discretion to continue or to dismiss the case. *NTN Bearing*, 15 CIT at ____, Slip Op. at 10; *Comeau*, 13 CIT at ____, 724 F. Supp. at 1411; *Florex*, 13 CIT at ____, 705 F. Supp. at 588; *Citrosuco Paulista*, 12 CIT at ____, 704 F. Supp. at 1085.

However, in deciding whether to continue or to dismiss an antidumping proceeding, the ITA must exercise its discretion "reasonably and the decision [must be] supported by substantial evidence." *NTN Bearing*, 15 CIT at ____, Slip Op. at 10. *See* 19 U.S.C. § 1516a(b)(1)(B) (1988). SKF contends that Commerce's determination was not supported by substantial evidence. In particular, SKF states that the ITA improperly relied on production figures from the Antifriction Bearing Manufacturers Association ("AFBMA") in calculating production levels in the cylindrical roller bearings industry. Plaintiffs argue that the AFBMA is a trade association which is not a reliable source of this data. The Court finds this argument wholly without merit since SKF itself relied on AFBMA data in determining its percentage of production for purposes of responding to Commerce's standing questionnaire on November 2, 1988. *See* Administrative Record ("AR") (Conf.) Doc. 14 at 6–7.

Furthermore, SKF alleges that AFBMA data is unreliable because it is trade association data based on the same type of estimates which were rejected by the ITA in *Frozen Concentrated Orange Juice From Brazil*, 52 Fed. Reg. 8,324 (1987). In *Frozen Concentrated Orange Juice*, the rejected data was based on a "succession of steps of estimations, rather than calculations," and there was contradictory information submitted by interested parties as to whether or not they supported the petition. *Id.* at 8,325. No such situation exists here. The ITA, which found the orange juice data "questionable," found the bearings industry's trade association data reliable. 54 Fed. Reg. at 19,005. Plaintiffs' use of the same data in its questionnaire response only adds to that data's credibility. The Court sees no reason to upset this finding.

SKF also challenges the ITA's decision to use U.S. Census data to calculate production levels in the spherical plain bearings industry because that data was from 1987 and the period of review in this case was October 1987 to March 1988. *Plaintiffs' Memorandum* at 23. None of the domestic producers of spherical plain bearings provided any information regarding total U.S. production of that class or kind of bearing. Hence, there was no basis for the ITA to reverse its presumption in favor of petitioners standing and the decision to press on with the spherical plain bearings investigation was correct.

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[1] To gauge the strength of the opposition to the petition, the ITA sent out questionnaires to those who opposed the petitioner's standing. Plaintiffs argue that the ITA should have probed the entire industry. This court held in *NTN Bearing* that the "ITA need not conduct a probe of the entire industry to determine a petitioner's standing." *NTN Bearing*, 15 CIT at ____, Slip Op. at 13. *See also Sandvik AB v. United States*, 13 CIT ____, ____, 721 F. Supp. 1322, 1328 (1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990); *Citrosuco Paulista, S.A. v. United States*, 12 CIT ____, ____, 704 F. Supp. 1075, 1085 (1988).

Six domestic producers expressed their opposition to petitioner's standing generally.[2] However, the ITA concluded that the opponents' production did not constitute a majority of the value of production in either the cylindrical roller bearings industry or the spherical plain bearings industry, and thus decided to proceed with the investigation. 54 Fed. Reg. at 19,005. The evidence in the record supports this conclusion. AR (Conf.) Doc. 37.

Accordingly, the Court holds that Commerce's determination that Torrington possessed standing to initiate an antidumping investigation on behalf of the cylindrical roller bearings and spherical plain bearings industries was supported by substantial evidence and was otherwise in accordance with law.

II. *Scope of Investigations*:

SKF also challenges Commerce's decision to include wheel hub units and aircraft bearings within the scope of the investigations.[3] Plaintiffs claim that the characteristics, functions and uses of these products differ from those of antifriction bearings ("AFBs"), and thus hub units and aircraft bearings should have been excluded from these investigations. *Plaintiffs' Memorandum* at 38.

This court has recognized that Commerce retains broad discretion to define the scope of an antidumping investigation. *Mitsubishi Elec. Corp. v. United States*, 12 CIT ____, ____, 700 F. Supp. 538, 552 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990); *see also Smith-Corona Group v. United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *NTN Bearing Corp. of America v. United States*, 14 CIT ____, ____, 747 F. Supp. 726, 731 (1990). That discretion must be exercised reasonably and any consequent determination must be supported by substantial evidence in the administrative record. *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *Gold Star Co. v. United States*, 12 CIT ____, ____, 692 F. Supp. 1382, 1383 (1988), *aff'd sub nom., Samsung Elec. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989).

A. *Wheel Hub Units*:

When a question arises as to whether a particular product is within the scope of an investigation, the ITA first must determine whether the petition covers that product. If the petition is ambiguous, Commerce then examines additional documentary evidence. If the scope is still unclear, Commerce looks to other criteria, including the factors enumerated in *Diversified Products Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).[4] *See Memorandum of the United States in Opposition to Plaintiffs' Motions for Partial Judgment Upon the Agency*

[2] The ITA found that the petition had the support of at least seven other domestic bearings producers. AR (Pub.) Docs. 15, 49, 417, 427, 445, 457 and 458.

[3] According to plaintiffs, there have been three generations of automotive hub units. Plaintiffs have not challenged the ITA's inclusion of generation 1 within the scope, but claim that generations 2 and 3 are "completely distinguishable from antifriction bearings." *Plaintiffs' Memorandum* at 38.

[4] These include the general physical characteristics of the merchandise, the expectations of the ultimate purchasers, channels of trade in which the goods travel, the ultimate use of the product, and its cost. *Id.*

Record Regarding Certain Fundamental Issues ("Defendants' Memorandum") at 62–64.

The pertinent Commerce regulation effective at the time Torrington filed its petition stated that the petition must contain a "detailed description of the imported merchandise in question, including its technical characteristics and uses, and, where appropriate, its tariff classification under the Tariff Schedules of the United States." 19 C.F.R. § 353.36(a)(4) (1987).[5] The petition described the merchandise in question as

> all ground antifriction bearings and all parts thereof both finished and unfinished with the exception of tapered roller bearings. (Footnote omitted). Included within the scope of this petition are ball bearings, cylindrical roller bearings, spherical roller bearings, spherical plain bearings, needle roller bearings, thrust bearings, tappet bearings, and all mounted bearings such as set screw housed units, bushings, pillow block units, flange, cartridge and take-up units and parts including balls, rollers, cages or retainers, cups, shields and seals.

AR (Pub.) Doc. 1 at 13. The bearings were described in more detail under separate headings, including "Housed Bearing Units." *Id.* at 19. Within this heading, wheel hub units were specifically listed, with an explanation that the "bearing configuration may be ball,roller, or otherwise." *Id.*

On May 24, 1988, the ITA expressly requested Torrington's counsel to indicate whether the petitioner wanted generations 1, 2 and 3 of hub units included in the scope and also whether it produces them. AR (Pub.) Doc. 59. In response, Torrington stated that

> the petition was intended to cover *all* antifriction bearings * * * and parts, including so-called application bearings and bearing units (e.g., bearings which incorporate some additional feature to permit ease of assembly, mounting, etc.). Thus, * * * wheel hub units (regardless of generation (i.e., I, II, III or some other nomenclature)) are all plainly included within the intended scope of the petition, regardless of the TSUS classification.

AR (Pub.) Doc. 49 at 5 (emphasis in original). Torrington also explained that it does not produce generation 1 wheel hubs for automotive use, but it does produce a similar product, to wit, a double-row bearing with a common race. Torrington does produce wheel hub units for other applications, such as machine tools and aircraft. *Id.* at 7.

Moreover, in an intra-office memorandum dated June 13, 1988, ITA analysts asserted that, while the issue of the scope of the investigations continued to confuse the parties as to certain products, there was no confusion surrounding wheel hub units. AR (Pub.) Doc. 72 at 1–2. Unlike other automotive parts, wheel hub units were clearly within the scope, and "were specifically named in the petition." *Id.* at 2. Hence, it is evident that the intent of the petitioner was to include wheel hub units,

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[5] A revised version of this regulation is now found at 19 C.F.R. § 353.12(b)(4) (1990).

regardless of generation, within the scope of the petition. Plaintiffs profess that, notwithstanding the intent of the petitioner, wheel hub units are so different from antifriction bearings that Commerce should not have included them in the scope.

SKF relies heavily on the *Diversified Products* criteria to support its contention that wheel hub units are not within the scope of the investigations. *Plaintiffs' Memorandum* at 36–42. The *Diversified Products* criteria are mandated for scope determinations only where the product in question is a newly developed one which was not in existence at the outset of the investigations. The ITA is not obliged to apply the *Diversified Products* criteria to a preexisting product. *American NTN Bearing Mfg. Corp. v. United States*, 14 CIT ____, 739 F. Supp. 1555, 1565 (1990). As it is not contested that wheel hub units were in existence at the outset of the investigations, the ITA's decision to rely on other factors, in particular the express language of the petition, was correct.

In the Final Determinations, Commerce stated that its scope determinations were based upon "comments from the petitioner and interested parties, our research memoranda and analyses undertaken in connection with these investigations, as well as on the ITC preliminary determination, questionnaire, and staff report." 54 Fed. Reg. at 19,007. Relying on this evidence, Commerce found that wheel hub units, even generations 2 and 3, are "simply bearings modified in ways similar to otherwise enhanced parts containing raceways. While wheel hub units may have features which allow them to serve additional functions such as facilitating mounting, they retain their essential bearing function." *Id.* at 19,014. Thus, they were included in the scope and, like the other classes of antifriction bearings, were categorized according to the type of rolling element they contain. *See The Torrington Co. v. United States*, 14 CIT ____, 745 F. Supp. 718 (1990).

Since the petition specifically named wheel hub units and additional documentary evidence supports the conclusion that they are within the scope, the Court need not inquire further. Accordingly, the Court holds that the ITA's determination that wheel hub units are within the scope of the investigation is supported by substantial evidence and is otherwise in accordance with law.

B. *Aircraft Bearings*:

SKF also asserts that aircraft components are a separate class or kind of merchandise not properly included within the scope. *Plaintiffs' Memorandum* at 43. Much of the dispute as to aircraft bearings seems to stem from a tussle over terminology. Plaintiffs repeatedly refer to the merchandise in question as "aircraft components," while the Final Determinations refer to "AFBs (including rod ends and other spherical plain bearings) used in aviation applications." 54 Fed. Reg. at 19,010. The term "aircraft *components*" is a general term which may encompass any element of an aircraft, while the merchandise which was part of this investigation was aircraft *bearings*.

This distinction was recognized by the ITA when it excluded from the investigations "airframe components that are unrelated to the reduction of friction." *Id.* However, aircraft *bearings* are within the scope of these investigations. SKF would have all AFBs used in aviation applications excluded from the scope of the investigations because, *inter alia*, they are of a "superior quality than any of the five classes or kinds of standard commercial bearings." *Plaintiffs' Memorandum* at 43.

Such an exclusion would have been in clear contravention of the express intent of the petition, which specifically stated that bearings used in "aircraft engines" and "aviation and aerospace" applications were covered by the petition. AR (Pub.) Doc. 1 at 14, 17, and Exhibit 4. Moreover, in its response to the ITA's scope clarification request, the petitioner explained that SKF's airframe components "are likely to be aircraft rod end bearings * * * a product of importance to Torrington." AR (Pub.) 49 at 6–7, and Exhibit 2. Similarly, the ITA's June 13, 1988, memorandum indicated that "[r]od ends and rod end bearings, which some parties have referred to as aircraft components," were subject to the investigations. AR (Pub.) Doc. 72 at 3.

As they did with wheel hub units, plaintiffs have attempted to segregate aircraft bearings from these investigations by using a *Diversified Products* analysis to prove that they are "more than bearings." *Plaintiffs' Memorandum* at 44; *see also* AR (Pub.) Doc. 65 at 4–8. For the reasons enumerated above, the Court need not conduct a *Diversified Products* analysis where the petition is unambiguous and additional documentary evidence supports the ITA's determination. Such is the case with aircraft bearings; they were expressly included in the petition, and later support for their inclusion was provided by petitioner to the satisfaction of the ITA.

Accordingly, the Court finds that bearings manufactured by SKF for aircraft applications were properly included in the scope of these investigations, and that aircraft components not related to the reduction of friction were properly excluded.

III. *Home Market Viability*:

Finally, SKF contests the decision by the ITA to use third country data to determine the foreign market value of SKF's ball bearings from Italy and Sweden, and spherical roller bearings from Sweden.[6] 54 Fed. Reg. at 19,033, 19,099, 19,115.

In the course of an antidumping investigation, Commerce must determine if the imported merchandise was sold in the United States at less than fair value. 19 U.S.C. § 1673d(a)(1) (1988). In doing this, the ITA compares the United States price of the goods to their foreign market value ("FMV"), and the amount by which FMV exceeds the U.S. price is

[6] Defendant-intervenor argues that SKF failed to exhaust its administrative remedies by not contesting this issue before the ITA prior to the Final Determinations. *Defendant-Intervenors Response to Plaintiffs' Motion For Partial Judgment on the Record* at 59. However, since other parties brought the issue to Commerce's attention during the investigations, and Commerce itself decided to recalculate home market viability as to SKF, defendant-intervenor's point is moot. Furthermore, the ITA did not reveal the results of the recalculation until the Final Determinations, hence SKF did not have an opportunity to contest it at the time.

the dumping margin. 19 U.S.C. § 1673e(a)(1) (1988). Determining FMV requires that the ITA choose which foreign market sales to use for comparison pursuant to a statutory and regulatory hierarchy. *U.H.F.C. Co. v. United States*, 916 F.2d 689, 692 (Fed. Cir. 1990).

Ideally, FMV is the price "at which such or similar merchandise is sold * * * in the principal markets of the country from which exported," that is, the home market of the firm. 19 U.S.C. § 1677b(a)(1)(A) (1988). However, if the ITA determines that the merchandise is not sold in the home market, or if

> the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which [such or similar merchandise is] so sold or offered for sale for exportation to countries other than the United States,

shall be the foreign market value. 19 U.S.C. § 1677b(a)(1)(B) (1988). In certain cases, even such "third country sales" may be an inappropriate basis for determining FMV, in which case the ITA may use "constructed value." 19 U.S.C. § 1677b(a)(2) (1988); 19 C.F.R. § 353.48(b) (1990); *see Kerr-McGee Chemical Corp. v. United States*, 14 CIT ___, ___, 741 F. Supp. 947, 950 (1990).

The statute and the ITA's own regulations state that home market sales will be used unless such sales are so small as to constitute an inadequate basis for comparison to U.S. sales. 19 U.S.C. § 1677b(a)(1)(B); 19 C.F.R. § 353.4 (1987).[7] Generally, home market sales are considered too small if they constitute less than five percent of the quantity sold in countries other than the United States. *Id.* In that case, since the home market is not "viable," FMV must be calculated by alternative means, that is, by using either third country sales or constructed value. 19 U.S.C. § 1677b(a)(2) (1988). Plaintiffs' complaint is that the ITA erred in its viability calculations for the Swedish and Italian home markets for ball bearings and for the Swedish home market for spherical roller bearings. *Plaintiffs' Memorandum* at 29.[8]

The first step in calculating foreign market value is determining whether the home market is viable, and thus whether it is the proper basis for comparison to the U.S. market. The ITA decided to conduct viability tests for each of the five classes or kinds of bearings under investigation, rather than, as is more common, for all of the such or similar merchandise categories. 54 Fed. Reg. at 19,020–021. This was because the variations in characteristics of the such or similar merchandise selected by Commerce would have made it "necessary to conduct several hundred viability tests." *Defendants' Memorandum* at 135. Given the

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[7] Now found in 19 C.F.R. § 353.48 (1990).

[8] The International Trade Commission ("ITC") found that sales of spherical roller bearings from Sweden were not materially injuring or threatening material injury to, or retarding the establishment of, a U.S. industry. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof From Sweden*, 54 Fed. Reg. 20,907–908 (1989). Hence, spherical roller bearings from Sweden were not subject to any antidumping duty order and the determinations as to them cannot be challenged by SKF. *See Rose Bearings Ltd. v. United States*, 15 CIT ___, 751 F. Supp. 1545 (1990).

statutory time constraints involved in an antidumping investigation and the unique complexity of the bearings investigations, this method of testing viability was reasonable and in accordance with law.

For ball bearings from Sweden and Italy, the ITA had to determine whether ball bearings were sold in Sweden and Italy and, if so, whether such sales were sufficient to form an adequate basis for comparison. The ITA found that SKF did sell ball bearings in Sweden and Italy. However, Commerce found that SKF's sales of ball bearings and parts thereof in each country constituted less than 5% of SKF's total non-U.S. sales, rendering the Swedish and Italian home markets not viable. 54 Fed. Reg. at 19,022.

SKF contends that the inclusion of parts in the viability calculations distorted the results. This is because SKF sells only finished bearings in Sweden and Italy, but sells both finished bearings and parts of bearings (*e.g.*, balls and rollers) to third countries. Thus, dividing finished bearings alone by finished bearings and parts yielded a figure of less than 5%.

This problem was brought to Commerce's attention during the investigations and, to "address possible problems of skewed results arising from the inclusion of parts, [the ITA] * * * performed the viability test again, excluding parts." *Id.* The outcome of the test was that there was "a substantial increase in the ratio of home market to third country sales, indicating that the inclusion of parts had skewed the results of the viability test." *Id.* This new ratio, however, was not disclosed by the ITA. In fact, the ITA failed to state whether the home markets for ball bearings were viable at all.[9] Instead, Commerce moved on to a third test, comparing home market sales to third country sales. The one with the most identical matches to products sold in the U.S., in this case the third country, was the one chosen for FMV calculations. *Id.*

The Court can see no reasonable justification for this additional test. Given that the inclusion of parts skewed the first viability test's results, the second test, comparing only finished bearings, should have been sufficient. If SKF's home market sales of finished bearings were greater than 5% of its non-U.S. sales, and if there was no good reason to bypass the 5% rule, the home market should have been deemed viable, and then used to calculate FMV. While the Court recognizes that the 5% rule is merely a guideline and not a hard and fast rule, it remains one of Commerce's regulations and the ITA is required to explain its decision not to use it in its viability determinations. This was not done in this instance.

Additionally, as home market sales are the statutorily preferred choice for comparison in FMV calculations, the ITA cannot use third country sales without first making a definitive determination that the home market is not viable. *See U.H.F.C.*, 916 F.2d at 698. Nowhere in the Final Determinations does Commerce state that the Swedish and Italian home markets for finished ball bearings were not viable.

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[9] In contrast, the ITA did state that the home market for SKF-Sweden's spherical roller bearings was not viable, regardless of whether parts were included in the calculations. 54 Fed. Reg. at 19,022.

While the ITA is granted broad discretion in conducting antidumping investigations, that discretion is not without limit; its determinations must be supported by substantial evidence in the record and must be in accordance with law. The fact that third country markets had more identical matches than the home markets does not constitute substantial evidence to support a decision not to use home market sales data, where that data is preferred by statute. *See also* S. Rep. No. 249, 96th Cong., 1st Sess. 94–96, *reprinted in* 1979 U.S. Code Cong. and Admin. News 381, 480–82.

Accordingly, the Court remands to the ITA the issue of foreign market value, with instructions to make a definitive determination as to whether or not the home markets for finished ball bearings from Sweden and Italy were viable. If they were viable, the ITA is instructed to recalculate FMV using home market sales data, and consequently, to recalculate the dumping margin in accordance with that data. If they were not viable, then the ITA's decision to use third country data and ultimately best information available, shall stand.[10]

CONCLUSION

The Court holds that the ITA properly concluded that petitioner, The Torrington Company, had standing to file an antidumping petition on behalf of the relevant domestic industries. Furthermore, the ITA correctly included wheel hub units and aircraft bearings in the scope of the investigations. However, on the issue of foreign market value, the Court finds that Commerce's decision to use third country data instead of home market data in its FMV calculations was not in accordance with law, and the issue is remanded to the ITA for further proceedings consistent with this opinion.

(Slip Op. 91–26)

JUDGMENT

TOMOEGAWA U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–06–00853

RE, *Chief Judge*: In accordance with the opinion of the United States Court of Appeals for the Federal Circuit in *Tomoegawa U.S.A., Inc. v. United States*, 861 F.2d 1275 (Fed. Cir. 1988), and in accordance with the representations of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: that the dry imaging ink and the toner for APECO 620 are classifiable under item 432.25, TSUS, with duty assessed at the rate of 7.9 per centum, and it is further,

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[10] The ITA found "numerous discrepancies, errors in methodology and mathematical errors" regarding the third country data submitted by SKF-Sweden and SKF-Italy, and therefore opted to use best information available instead of SKF's third country data in determining FMV. 54 Fed. Reg. at 19,034. Since the Court finds that the determination not to use home market data was not in accordance with law, the Court does not pass judgment on whether the decision to use best information available was correct.

ORDERED, ADJUDGED AND DECREED: that the action is dismissed.

Dated: New York, New York, April 5, 1991.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on April 5, 1991 is being published by the Clerk's Office as Slip Op. 91–26.

(Slip Op. 91–27)

JUDGMENT

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS AND ALGOMA STEEL CORP., LTD. AND SONCO STEEL TUBE DIV., FERRUM, INC., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–06–00753

RESTANI, *Judge*: This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED: that the results of the third remand are sustained, and this action is dismissed.

Dated: New York, New York. January 9, 1991.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on January 9, 1991 is being published by the Clerk's Office as Slip Op. 91–27 on April 11, 1991.

(Slip Op. 91–28)

JUDGMENT

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS AND ALGOMA STEEL CORP., LTD. AND SONCO STEEL TUBE DIV., FERRUM, INC., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–07–00853

RESTANI, *Judge*: The Department of Commerce having reported on May 23, 1990, the results of the remand ordered by this Court, and the agency having stated in the results that the countervailing duty order should be vacated because the recalculated countervailing duty was *de minimis*, and no parties having opposed these remand results, and after deliberation,

IT IS HEREBY ORDERED: that the results of the third remand are sustained; that the Department of Commerce shall take appropriate action in conformity with the remand results; and that this action is dismissed.

Dated: New York, New York, January 24, 1991.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on January 24, 1991 is being published by the Clerk's Office as Slip Op. 91–28 on April 11, 1991.

(Slip Op. 91–29)

JUDGMENT

SONCO STEEL TUBE DIVISION, FERRUM, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–07–00899

RESTANI, *Judge*: This case having been submitted for decision and the Court, having sustained in part the results of the remand ordered in *Sonco Steel Tube Div. v. United States*, 13 CIT ___, 714 F. Supp. 218 (1989), and plaintiffs having dismissed all remaining counts of their complaint, now, after deliberation,

IT IS HEREBY ORDERED: that the remand results are sustained; that the Department of Commerce shall take appropriate action in conformity with the remand results; and that this action is dismissed.

Dated: New York, New York, January 24, 1991.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on January 24, 1991 is being published by the Clerk's Office as Slip Op. 91–29 on April 11, 1991.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSES
C91/81 4/2/91 Re, C.J.	Elbe Products Corp.	87–8–00858	355.25 Various
C91/82 4/3/91 Aquilino, J.	Accutime	87–2–002866	716.09–71 715.15 e Various
C91/83 4/3/91 DiCarlo, J.	Mitsui & Co.	87–2–00335	610.49 or Various
C91/84 4/3/91 DiCarlo, J.	Mitsui & Co.	88–7–00590	610.49 or Various
C91/85 4/3/91 Tsoucalas, J.	Olympus Corp.	89–3–00161	708.93 9%
C91/86 4/4/91 Musgrave, J.	Bauerfeind USA Inc.	89–10–00578	389.48 12.5%

IFICATION DECISIONS

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
s rates	359.60 Various rates	Elbe Products Corp. *v.* U.S., 11 CIT 518 (1987)	New York Viledon, etc.
16.45, etc. s rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
610.52 s rates	664.08 Various rates	Agreed statement of facts	Buffalo & New York Seamless steel drill pipe
610.52 s rates	664.08 Various rates	Agreed statement of facts	Los Angeles & Houston Seamless steel drill pipe
	676.54 Free of duty	EAC Engineering *v.* U.S., 9 CIT 534 (1985)	New York Olympus Optical Actuator Model TAOHS-PB, etc.
	709.57 5.8%	Agreed statement of facts	Atlanta Orthopedic & therapeutic joint supports

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